2010 WL 1845939 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

Karen GOO, Ron Leinweber, Sue Leinweber, Nancy Oshiro, Amber Torrecer-paz, Reyn Tateyama, Emery Lee, Donna Lee, Larry Oshiro, Adrienne Owens, Yoshi Sakuma, Jane Sakuma, Lillian Torrecer, Kahai Shishido, Wendy Shishido, Clark Nakamoto, Scott Oshiro, John Zaner, Julie Zaner, Andrew Fujikawa; Sheila Fujikawa; Juanito Riglos, Janis Riglos, John Waiwaiole, Norma Waiwaiole, Eric Engh and Emily Engh, Plaintiffs/Counterclaim Defendants/Appellees/Appellants,

v.

Mayor Charmaine TAVARES, Successor-in-Interest to Mayor Alan Arakawa, Jeff Hunt, Director of Planning, County of Maui, Successor-in-Interest to Director Michael Foley, County of Maui, Defendants/Cross-Claim Defendants/Cross-Claimants/Appellants, VP & PK (ML) LLC; Kcom Corp., Defendants/Intervener-Defendants/ Cross-Claim Defendants/Counter claimants/Cross-Claimants/Appellees, Kila Kila Construction, Defendant/Cross-Claim Defendant/Cross-Claimant/Appellee, (John G.) John G's Design & Construction, Inc., Defendant/Cross-Claim Defendant/Cross-Claimant/Appellee, New Sand Hills LLC, Defendant/Intervener-Defendant/Counter-Claimant/Cross-Claim Defendant/Appellee, David B. Merchant; Joyce Takahashi; Brian Takahashi, Defendants/Intervener-Defendants/Appellees, Diane L. Reaser, Donald N. Reaser, Maui Lani Golf Investors LLC, Maui Lani Partners, Maui Lani 100 LLC, Maui Lani Phase 6 LLC, the Traditions, Inc., Defendants/Intervener-Defendants/Counter-Claimants/Appellees, Doe Defendants 1-100, Defendants/Intervener-Defendants/Cross-Claimants.

No. 30142.
March 19, 2010.

Civil No. 07-1-0258 (1) [Declaratory Relief] Circuit Court of the Second Circuit, State of Hawaii, The Honorable Joel E. August Judge

Plaintiffs/Counterclaim Defendants/Appellees/Appellants' Opening Brief Appendices 1 through 19 Certificate of Service

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I. *INTRODUCTION.*

In 1991, Appellee County of Maui (the County) enacted a zoning ordinance limiting the height of new construction on Maui to 30′ from the natural or finish grade, whichever is lower. The ordinance is known as the "Height Restriction Law" (HRL). [1]

Thirteen years later in 2004, the developer VP & PK (ML) LLC began to grade a large area within the Maui Lani Project District Area (located in Wailuku and Kahului) in preparation to build a subdivision. The Department of Planning informed the developer multiple times in writing that the HRL applied. The grading permits issued for the project expressly required that all construction adhere to the HRL. Rather than enforce its law, the County took drastic and illegal action to exempt the developer from the HRL.

When Valentine Peroff, Jr. (Peroff), the principal member of the developer VP & PK (ML) LLC, learned that the Department of Planning had concluded the HRL applied, he requested and received a closed-door, private meeting with former Mayor Alan ***2** Arakawa (Mayor Arakawa). This meeting occurred on December 22, 2004. Peroff expressed his "concern" that the HRL interfered with his plans. Mayor Arakawa promised to clear the path for the subdivision regardless of the HRL. Mayor Arakawa instructed the Department of Planning, pursuant to an "administrative decision" to exempt the developer from the HRL, which it promptly did. This illegal transaction is documented in Peroff's declaration filed in court, letters written by Mayor Arakawa, and Arakawa's hearing testimony. (Record citations to these facts are in Section II, *infra)*.

Mayor Arakawa had no authority to make what he termed "an administrative decision" to exempt the developer from the HRL. Only the Department of Planning, following the due process of law had jurisdiction over the applicability of the HRL.

Appellants are a group of homeowners residing within and adjacent to the Maui Lani Project District Area (Homeowners). It soon became clear to Homeowners from the vast amount of fill towering above the natural grade that the developer intended to blatantly disregard the HRL when it began construction. Confronted with Mayor Arakawa's illegal "administrative decision" and with no other recourse, Homeowners brought suit against the County for declaratory and injunctive relief to enforce the HRL. The County stridently opposed this action, and championed Mayor Arakawa's supposed authority to override the HRL.

Homeowners prevailed on summary judgment. The County was ordered to abide by the HRL and not to issue any building permits for nonconforming construction. Homeowners moved for attorneys' fees under the private attorney general doctrine following the Supreme Court's holding in *The Sierra Club v. The Department of Transportation*, 120 Hawai'i 181, 202 P.3d 1226 (2009). Despite finding that Homeowners' suit was in the public interest and necessary to preserve the rule of law on Maui, the trial court erroneously denied the request.

Homeowners respectfully request the Intermediate Count of Appeals (ICA) to reverse the order denying the request for attorneys' fees, to enter an order that ***3** Homeowners be awarded attorneys' fees against the County, and to remand to the trial court for a determination of the amount of the award.

II. *STATEMENT OF THE CASE*.

A. *Procedural History*.

1. *Homeowners' Motion For Partial Summary Judgment*.

Homeowners' Complaint contained two distinct sets of claims. The first was for declaratory and injunctive relief against the County to enforce the HRL. The second was against the developer and its contractors for property damage to their homes from the inundation of dust from the vast amount of fill used for grading, vibration damage from compacting the fill, and other damages. ROA at V.1, 1.

Addressing only the HRL claim, Homeowners filed Plaintiffs' Motion for Partial Summary Judgment on November 16, 2007 (MPSJ). ROA at V.5, 111. This asked only for the trial court to decide whether to enforce the HRL by appropriate order. The MPSJ was vigorously opposed by the County. V. 7, 142.

Prior to deciding the MPSJ, the trial court made a number of related rulings. The trial court ordered the Homeowners to file a Third Amended Complaint to name an additional developer defendant and two more homeowner plaintiffs. Homeowners promptly complied. ROA at V. 9, 154.

The trial court also decided numerous motions to dismiss filed by the County and the developer. The trial court correctly rejected their arguments. Essentially, following *Brescia v. N. Shore Ohana*, 115 Hawai'i 477, 168 P.3d 929 (2007), the trial court rejected the notion that the developer somehow acquired vested rights or otherwise was entitled to rely upon Mayor Arakawa's illegal "administrative decision." ROA at V. 13, 207, 209; V. 14, 220; V. 16, 279; V. 19, 302; V. 22, 343.

***4** Concerned that there might be similar suits brought in the future, the trial court ordered the Homeowners to send by certified mail a notice of the pending action to every property owner in the Maui Lani Project District Area. Homeowners complied, sending nearly one thousand notices. ROA, V. 17, 295; V. 15, 265; V. 18, 296.

The trial court also bifurcated the proceeding, separating the Homeowners' request for declaratory and injunctive relief against the County from the property damage claims against the developer. The trial court ordered the Homeowners to file a Fourth Amended Complaint naming only the County as a defendant and asserting claims only for declaratory and injunctive relief. ROA at V. 16,284. Homeowners promptly did so. ROA at V. 19, 303. The question of the County's liability remained in the instant case.

The developer intervened as a defendant in the Fourth Amended Complaint, but stipulated to dismissal shortly before the hearing on Homeowner's MPSJ. ROA at V. 28, 390.

Eight months after Homeowners' MPSJ was filed, during which time they were bombarded with motions and required to send out hundreds of notices to project district residents, the trial court on December 31, 2008, decided the MPSJ. ROA, V. 28, 392. The trial court correctly granted the motion and ordered the County to comply with the HRL, and not to issue any building permits for nonconforming structures. *Id*.

2. *Homeowners' Request For Attorneys' Fees Against The County.*

Based on the grant of the MPSJ, Homeowners requested attorneys' fees under the private attorney general doctrine. ROA at V. 29, 397; V. 31, 413. At the hearing the trial court found that the suit was necessary to preserve the rule of law on Maui and to clarify the authority of the mayor and the Department of Planning. TR 2/24/09 at 25-30. The fee request was denied, only costs were allowed. ROA at V. 31, 427.

***5** Shortly after the hearing, the Hawaii Supreme Court decided *Sierra Club*. Based on the holding in *Sierra Club* regarding the private attorney general doctrine, Homeowners moved for reconsideration of the denial of their attorney fee request. ROA at V. 31,423. It was again denied. ROA at V. 38, 491.

Homeowners timely filed this appeal to reverse the erroneous denial of their fee request. V. 39, 514.

B. *Factual Record.*

A concise factual record is found in Homeowners MPSJ. ROA at V. 5, 111. Mayor Arakawa's testimony regarding his "administrative decision" was given at an early evidentiary hearing in this proceeding. TR 10/24/08. The undisputed factual record upon which the trial court granted the MPSJ follows, which provides the context to understand why Homeowners are entitled to an award of attorney fees under the private attorney general doctrine.

In 1990, Maui Lani Partners (an entity wholly distinct from developer VP & PK (ML) LLC) received a preliminary Phase II Project District Approval for the Maui Lani Project District Area, which could not be transferred without prior written permission of the Planning Commission:

That the subject Phase II Project District Approval shall not be transferred without prior written approval of the Planning Commission.

Appendix 1 at ¶ 13.

The record is devoid of "written approval" to transfer the approval from Maui Lani Partners to its current alleged holder VP & PK (ML) LLC. In fact, VP & PK (ML) LLC did not exist until April 29, 2004. Appendix 2. Therefore, any transfer of the Phase II approval from Maui Lani Partners to VP & PK (ML) LLC (if it occurred) was at least ***6** thirteen years after the Height Restriction Law (HRL) went into effect in 1991.

The Phase II approval granted to Maui Lani Partners expressly gave notice of the condition of: "full compliance with all other applicable governmental requirements." Appendix 1 at ¶ 16. Also, the Phase II approval was expressly conditioned on: "full compliance with the comments of the Department of Public Works as stated in their memo dated August 6, 1990." *Id*. at ¶ 4. In the August 6, 1990 memo, Maui Lani Partners was informed:

Since **no architectural plans were provided** for the commercial and multifamily buildings, consideration for the Phase II Project District **Approval at this time will be only for the subdivision of the project into lots for the various uses.** The applicant will have to submit for Phase II approval with architectural plans for the different uses (commercial, multifamily, golf clubhouse, etc.)

Appendix 3 at p. 16, ¶ 11 (emphasis added).

The August 6, 1990 memo makes clear that Maui Lani Partners received nothing more than the approval of its proposed use of the land, and not specific approval of any construction projects. Indeed, there were no plans provided at that time.

Also, the subject of the Phase II approval given in 1990 was limited to TMK: 3-8-07:2, 103 (por.), 109, 110 (par.), 121, and 3-8-46:20. Appendix 1. This apparently did not even include the parcels that were the subject of this lawsuit, *i.e.*, the Fairways Project [2] at TMK 3-8-007: Portion 138, or the New Sand Hills Project [3] at TMK 3-8-007: Portion ***7** 136-137, whose TMK numbers are not included in the Phase II approval. *Id*.

In any event, in 1991 the County enacted the HRL and its related Supremacy Clause. The new ordinances were unambiguous. MCC § 19.04 defined "Height" as "the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, **whichever is lower."** Appendix 16. (Emphasis supplied). MCC § 19.08.050 stated: "No building shall exceed two stories nor thirty feet in height." Appendix 17.

The Supremacy Clause, MCC § 19.04.030, stated:

In the interpretation and application of the same, provisions of this article shall be held to have been enacted for the purpose of promoting the safety, health, convenience and general welfare of the community. It is not intended by this article to interfere with or abrogate or annul any easements, covenants or other agreements between parties; provided, however, that **where this article imposes a greater restriction** upon the use of buildings or premises or upon height of buildings or requires larger open spaces than are imposed or required by other ordinances, rules, regulations or easements, covenants or agreements, the provisions of **this article shall govern.**

Appendix 18 (emphasis added).

Long after the HRL had gone into effect, on October 18, 2003, the New Sand Hills Project received preliminary subdivision approval, with final approval expressly contingent upon compliance "with requirements/comments from the Department of Planning." Appendix 4 at ¶ 6.

***8** On April 29, 2004, VP & PK (ML) LLC was organized. Appendix 2.

On August 2, 2004, the County approved a grading permit application for the New Sand Hills Project **which expressly required** that the HRL be followed. Appendix 5 at ¶ 10.

Also, on August 2, 2004, the Fairways Project received preliminary subdivision approval, in which the HRL was again expressly mandated:

The proposed grading of the lots shall be consistent with the maximum building heights for the respective zoning. **Building heights for new structures are limited to 30 feet above the existing natural grade.**

Appendix 6 at ¶ 6(c) (emphasis added).

On December 13, 2004, the Department of Planning reiterated the binding effect of the HRL:

Be advised that the Department of Planning has notified our office that they do not recognize the finish elevations on approved grading plans as the benchmark to measure building height. **If the natural grade is lower than the finish grade, the natural grade will be used as the benchmark to measure building height.** Attached is a copy of the e-mail from the Department of Planning dated December 9, 2004.

Appendix 7 (emphasis added).

On December 14, 2004, the Department of Planning rescinded its recommendation for final approval of the New Sand Hills Project because of the HRL. Appendix 8.

***9** Outraged by the County's decision to follow its own law, Valentine Peroff, Jr. (Peroff), the principal member of VP & PK (ML) LLC, went to a closed-door meeting on December 22, 2004, with former Mayor Alan Arakawa (Mayor Arakawa), at which Peroff "expressed [his] concern" as to the County's enforcement of the HRL. Peroff admits the details in his declaration, which his attorneys filed in court. Appendix 9. At this private meeting, Mayor Arakawa promised Peroff that the HRL would not be enforced against the Peroff development. *Id*. at ¶ 12. Shortly thereafter, on January 5, 2005, the Department of Planning reversed its position of the prior year and granted Phase III approval to the Fairways Project. Appendix 10.

Notwithstanding the politically motivated reversal, the very next grading permit application made for the New Sand Hills Project **still contained the requirement to follow the HRL.** Appendix 11. The construction plans for New Sand Hills were not approved until March 22, 2005. Appendix 12.

On May 12, 2005, when VP & PK (ML) LLC applied for a grading permit for the Fairways Project, it was again specifically informed of, and agreed to abide by, the HRL:

The applicant is advised that there are zoning restrictions of building heights which are measured from the top of the structure to the natural or finish grade, whichever is lower. For example, residential, agricultural, and rural districts have a height restriction of 30 feet. **Placing fill on your lot will reduce the allowable height to less than 30 feet from the finished grade.**

Appendix 13 at "Standard Grading Conditions," at ¶ 14 (emphasis added). VP & PK (ML) LLC agreed it understood and would comply with the "Standard Grading Conditions." *Id*.

***10** In letters dated May 31, 2005, and December 22, 2005, Mayor Arakawa made clear that it was he, and not the Department of Planning, who was responsible for the exemption of the developer from the HRL:

To resolve this conflict, **I made an administrative decision** to allow the project to proceed with the building heights determined from the finished grade. **Project District Phase 3 approval was granted based on this decision.**

Appendices 14 and 15 (emphasis added).

At an early evidentiary hearing in this proceeding, Mayor Arakawa explained his "administrative decision to exempt the development from the HRL." TR 10/24/08. Arakawa emphasized that this was his decision and his decision alone. *Id*.

Because of Mayor Arakawa's "administrative decision," Homeowners faced the prospect of a development towering well over the established limit of 30′ from the natural or finish grade, whichever is lower. Because of Mayor Arakawa's "administrative decision," the general public on Maui faced the frightening prospect of government by personal fiat rather than through the established political process. Faced with this anamoly, the trial court correctly granted Homeowners' motion for partial summary judgment to enforce the HRL, but erred in denying attorney fees under the private attorney general doctrine.

III. *POINT ON APPEAL*.

1. Whether the trial court erred in denying Homeowners' request for attorneys' fees against the County under the private attorney general doctrine. The motions seeking fees are at ROA V. 29, 397 and V. 31, 413. The trial court's denial is articulated at TR 2/24/09 at 22/and at TR 4/23/09 at 4-10.

***11** IV. *STANDARD OF REVIEW*.

"The trial court's grant or denial of [attorneys'] fees and costs is reviewed under the **abuse** of discretion standard." *The Sierra Club v. The Department of* Transportation, 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009). "An **abuse** of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment to a party litigant." *State v. Lee*, 90, 130, 134, 976 P.2d 444, 448, *cert. denied*, 528 U.S. 821 (1999) (citations and internal quotations signals omitted).

V. *ARGUMENT*.

Homeowners expended considerable time and expense before ultimately prevailing on summary judgment. The County refused to enforce its own, readily understandable zoning ordinance, and worked diligently to justify the results of an obviously illegal "administrative decision" by Mayor Arakawa. The Department of Planning abrogated their duty and surrendered to Mayor Arakawa's personal fiat. The County therefore blatantly and illegally favored a developer over its own residents. Homeowners had to obtain counsel willing to oppose the unlimited resources of the County and the aggressive high-powered attorneys procured by the developer, with whom the County allied itself.

If Homeowners had not filed this lawsuit and seen it through, Mayor Arakawa's "administrative decision" would have set the repulsive precedent that the mayor was free to proclaim the law to fit the needs of a private party without any regard to what the law actually is. As discussed below, Homeowners meet all the elements for an award of attorneys' fees under the private attorney general doctrine, and the trial court **abused** its discretion in denying such fees.

***12 A. *Findings By The Trial Court In Homeowners' Favor*.**

The trial court denied Homeowners' first request for attorneys' fees under the private attorney general doctrine. But at the hearing on February 24, 2009, using the three-prong analysis given in *In re Water Use Permit Applications (Waiahole II)*, 96 Hawai'i 27, 25 P.3d 802 (2001), the trial court found Homeowners **easily** met the first two prongs of the test because the lawsuit: (1) vindicated an important public policy, and (2) was necessary and burdensome. Appendix 19 at 25-30.

The trial court wrongly decided, however, that the third prong, providing a benefit to a large number of people, was not met. Lacking guidance from the Supreme Court, the trial court specifically declined to adopt the expansive view that the entire public benefits from the clarification of an existing law. *Id*.

An expansive view of the third prong, however, was subsequently expressly affirmed by the Supreme Court in *Sierra Club*, which formally adopted the private attorney general doctrine and the three-prong test. There, the Supreme Court held the third prong was satisfied because the community benefits **when an environmental law is clarified.** *Sierra Club* at 221, 202 P.3d at 1266. Applying the holding of *Sierra Club*, Homeowners moved for reconsideration of the trial court's initial denial of an award of fees. In *Sierra Club*, the Department of Transportation ("DOT") exempted the Superferry from the environmental assessment process. Similarly, Homeowners argued that the third prong of the doctrine was readily satisfied because it took their lawsuit to force the County to follow its own ordinances. The trial court erroneously remained unconvinced, and again denied the request for attorney fees.

As in *Sierra Club*, Homeowners' lawsuit was necessary to stop unlawful government action in favor of one party that vitiated the equal application of the law intended to benefit the public as a whole. But for Homeowners' lawsuit, the County would have persisted in its illegal policy of ignoring a straightforward zoning law for the ***13** benefit of a particular developer, which proceeded based on the illegal "administrative decision" made by then Mayor Arakawa. Homeowners' lawsuit significantly promoted the rule of law over the arbitrary, unlawful exercise of power by County officials.

The trial court's express findings at the first hearing on February 24, 2009, fully support Homeowners' position. In discussing the three-prong analysis, the trial court stated:

> But there are certain factors that are set out by our Supreme Court. One is the strength or societal importance of the public policy vindicated by the litigation. Here I don't think that's a significant [sic] for the plaintiffs. I think certainly there is a - you know, an issue -- societal importance in terms of public policy that was, in essence, I think vindicated here. The second criteria or element is the necessity for private enforcement and the magnitude of the result and burden on the plaintiff. Again I don't think that actually is really a high hurdle for the plaintiffs to have met in this case. There certainly was a necessity for private enforcement. There seems to be nothing on the horizon indicating that the County was going to *sua sponte* enforce the 30-foot requirement on its own out of some private feeling of guilt for what had been created here. And obviously there were a lot of hours that were imposed on plaintiffs' counsel to deal with this matter. I think the problem comes in with regard to the third element.

Appendix 19 at 25-26.

Thus, the record demonstrates a factual finding that the first two prongs were satisfied. In turning to the third prong, however, the Court erroneously declined to adopt an expansive view of the number of people benefitted by the clarification of the law. The trial court stated:

> I know that there is an implied argument here that everybody in the County gets to benefit from clarification of or enforcement of a particular ordinance. But I think that that's a little expansive. I think the courts are expected to look at the -- you know, the actual situation involved in applying the third ***14** criteria, and

> in some cases that's pretty clear. But the Court's tried to do an analysis of that in this particular case and in terms of the breadth of the relief in terms of numbers of people benefitted.

Id. at 26.

Following this more restricted analysis, the trial court found the third prong unsatisfied. *Id*.

The record shows, however, that if the holding in *Sierra Club* is correctly applied to the trial court's findings, the third prong is met. The trial court expressly recognized that Homeowners' lawsuit clarified the "legal chaos" and "environmental chaos" ensuing from the County's lack of guidelines and *ad hoc* decision-making by the mayor. The trial court found Homeowners' lawsuit promoted the vital public policy that we are a nation of laws, and not of men or women. The trial court found:

> And in this analysis, the Court -- given the applicability of that doctrine, the Court certainly does not wish to discount the significance of the lawsuit that was brought by the plaintiffs. Clearly the financial burden of bringing those claims has been tremendous, and it is clear that private enforcement was necessary. What I think plaintiffs' case has demonstrated is the legal chaos that results -- **not just legal chaos, but sort of from a certain standpoint environmental chaos** which results from the failure of the County to adequately articulate policy guidelines relative to general zoning ordinances. And also from the County's CEO making some *ad hoc* planning policy decisions in response to threats of litigation from developers who claim to have vested rights in some particular project. I mean, it really, I think, represents a failure to recognize the distinct boundaries which should exist among the powers of the County Council, the Planning Commission, the Planning Department, and the Mayor's office. We are supposed to be a government of laws and not of persons. **We used to say men, but we're in a new age. And I think this case has shown the community what happens when we become a government of persons and not a government of laws, and that's terribly significant.**

***15** *Id*. at 29-30 (emphasis added).

Given the expansive view of the third prong adopted in *Sierra Club*, the trial court's finding that Homeowners' lawsuit was "**terribly significant**" in clarifying the distinct boundaries between County agencies and in promoting the rule of law on Maui certainly satisfies the third prong based on prevailing authority, as discussed in detail below. It is also most certainly true that all residents of Maui have been reassured that it is worth their time to attend public hearings on zoning issues, and that future decisions made with their input will not simply be contravened by an "administrative decision" of the mayor.

In addition, at the end of the hearing, counsel for the County flatly misrepresented the record by claiming it had always conceded Mayor Arakawa lacked power to make his "administrative decision," and that Homeowners' lawsuit was unnecessary to prove this point:
Ms. D'enbeau [counsel for the County]:

And the second part is that the County immediately conceded that the mayor did not have the authority to issue that administrative decision, so there wasn't any litigation necessary for that point.

The Court: When did the County concede that?

Ms. D'enbeau:

In our answer. I believe we never argued that mayor had the right to issue the letter saying I'm making an administrative decision that we're going to go this way. And it was never our argument that we had the right to do that. So that's just the point if that's the argument that's being made, that it wasn't necessary to litigate that issue.

Id. at 41. (Emphasis supplied).

***16** Counsel's statement was completely false, but typical of how the County defended this suit. Such a concession was never made. Homeowners alleged that Mayor Arakawa sent two letters referencing his "administrative decision" to invalidate the HRL, and that this exceeded the mayor's authority under the County Charter. ROA at V. 9, 154 *f*, ¶¶ 5, 39, 42, 46. Homeowners alleged the mayor had no power to enact, modify or repeal the law:

6. The Charter of the County of Maui (hereafter "the Charter") states at Section 3-6 that "The council shall be the legislative body of the county." The Charter, at Article IV, explains with precise detail the method by which the council may enact, amend or repeal ordinances. The powers of the Mayor are described in Article VII of the Charter. **The Charter does not empower nor delegate to the Mayor the authority to enact, modify or repeal ordinances. Neither the state constitution nor state statute provide the Mayor the authority to enact, amend or repeal ordinances.**

Id.

In its Answer, the County only admitted sending the letters but **denied** any legal violation. The County admitted Article VII of the County Charter describes the powers of the mayor but **denied** the remaining allegations that it provides no authority for him to enact, modify or repeal the law:

7. With respect to the allegations contained in paragraphs 39 and 42 of the Complaint, County Defendants admit that the letters containing the quoted language were sent as stated, but **specifically deny the allegation that "... such height violated existing zoning ordinances."**

*** * ***

***17** 9. With respect to the allegations in the **paragraph 46** County Defendants' admit that Section 3-6 of the Charter is correctly quoted in part and that the Charter describes the powers of the Mayor in Article VII **and deny the remaining allegations in said paragraph.**

ROA at V. 13, 192 *f* at ¶¶ 7 and 9.

Accordingly, the County never conceded that the mayor was unauthorized to make such an "administrative decision" to exempt a developer from the HRL. County counsel's statement to the contrary was an outrageous misrepresentation, intended to stave off attorneys' fees. The plain fact is that the County vehemently supported the mayor's right to make such an "administrative decision," which would give the mayor legislative authority. The County strenuously opposed this lawsuit, which was essential to clarify the vital point that the mayor has no such authority.

B. *Homeowners Are The Prevailing Party.*

Under *Sierra Club*, a prevailing party is defined as:

> In general, a party in whose favor judgment is rendered by the district court is the prevailing party in that court, plaintiff or defendant, as the case may be. Although a plaintiff may not sustain his entire claim, if judgment is rendered for him, he is the prevailing party for purposes of costs and [attorney's] fees.

Sierra Club at 215, 202 P.3d at 1260 (citations omitted).

The Supreme Court emphasized that a prevailing party is one who prevails "on the disputed main issue, even though not to the extent of his original contention." *Id*. at 216, 202 P.3d at 1261 (citations omitted).

There can be no doubt that Homeowners prevailed on the "main issue" of their lawsuit. Homeowners successfully obtained their goal of enforcing the HRL despite the County's decision to exempt the developer from it. The trial court entered summary judgment in favor of Homeowners and restricted the County from issuing any building ***18** permits or approvals that did not conform to the HRL. The trial court granted costs to Homeowners against the County as the prevailing party. ROA at V. 31, 427.

C. *The Private Attorney General Doctrine Is Applicable.*

The Supreme Court held in *In re Water Use Permit Applications (Waiahole II)*, 96 Hawai'i 27, 25 P.3d 802 (2001) that:

> The doctrine is an equitable rule that allows courts in their discretion to award attorney's fees to plaintiffs who have vindicated important public rights. Courts applying this doctrine consider three basic factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision. **Simply stated, the purpose of the doctrine is to promote vindication of important public rights.** A number of courts have adopted and applied the "private attorney general" doctrine in awarding attorney's fees to public interest litigants. (citations omitted)

Id. at 29, 25 P.3d at 804. (Emphasis supplied).

The Supreme Court formally adopted the private attorney general doctrine and the three-prong test. *Sierra Club* at 221, 202 P.3d at 1266.

D. *Homeowners Meet Each Of The Three Prongs.*

1. *First Prong -- The Strength Or Societal Importance Of The Public Policy Vindicated By The Litigation.*

Homeowners' lawsuit vindicated the important public policy of the rule of law, and not of persons, on Maui, and clarified the County Charter and the generally applicable zoning law. It clarified the boundaries of authority of County officials and agencies granted by the County Charter; that the mayor cannot exercise legislative power; that the County cannot exempt a developer from the zoning law using an "administrative decision" issued by the mayor; that the decisions of the Department of Planning cannot be ***19** overruled by the mayor; that zoning decisions must be made by the Department of Planning following the lawful procedures of public hearings and appeals, not by mayoral fiat after a private meeting with a developer.

This lawsuit prevented the dangerous precedent of allowing a mayor to become a one-man county council, making the law by proclamation instead of by democratic process. Since it is vitally important to defend the principle that the County must neutrally apply its own laws, Homeowners meet the first prong of the *Sierra Club* test, as the trial court recognized.

2. *Second Prong -- The Necessity Of Private Enforcement And The Magnitude Of The Resultant Burden On Plaintiffs.*

Homeowners' lawsuit was necessary because Mayor Arakawa and the Department of Planning wholly abandoned their duties under the County Charter. It was necessary to challenge the mayor's usurpation of authority vested in the Department of

Planning, and to compel the Department of Planning to enforce the zoning law. Because the County acquiesced to the mayor's "administrative decision," it made private enforcement of the HRL by this lawsuit not only necessary, but the only available remedy.

The Sierra Club's lawsuit against the DOT met the second prong because its lawsuit was necessary "to enforce the DOT's duties to the public under the *Hawai'i Constitution*, statutes, and the public trust doctrine." *Sierra Club* at 220, 202 P.3d at 1265. The DOT breached its duty by erroneously exempting the Superferry from the environmental law:

> In contravention of its responsibilities under the laws of this state, DOT **exempted** the Superferry project from the requirements of H.R.S. Chapter 343 without considering its secondary impacts upon the environment. The action brought by Sierra Club **clarified DOT's responsibilities** under ***20** H.R.S. Chapter 343 by challenging DOT's erroneous interpretation of those duties.

Id. at 221, 202 P.3d at 1266. (Emphasis added).

Likewise, Homeowners' lawsuit was necessary because the County erroneously exempted the developer from the zoning law.

Also, the case at bar is readily distinguishable from *Maui Tomorrow v. BLNR*, 110 Hawaii 234, 131 P.3d 517 (2006), which was distinguished in *Sierra Club*. In *Maui Tomorrow*, the second prong of the test was not met because the challenged government policy resulted from an erroneous understanding that another state agency was to perform the duty at issue. The duty was not abandoned, but it was assumed that another agency would perform it. The Supreme Court distinguished the facts in *Sierra Club* because: "DOT was not under the erroneous understanding that another agency was considering those impacts, as in *Maui Tomorrow;* rather, in this case DOT wholly abandoned that duty **by issuing an erroneous exemption** to Superferry." *Sierra Club* at 221, 202 P.3d at 1266 (emphasis added).

Here, Mayor Arakawa did not have an "erroneous understanding" that another agency was handling the duty at issue, *i.e.*, deciding on the HRL. He knew perfectly well that the Department of Planning concluded the HRL applied, which was stated on all of the grading permits and given in writing as a reason for refusing Phase III approval. But after a private meeting with the developer, Mayor Arakawa abandoned his duty to remain neutral, and exceeded his authority by issuing an erroneous exemption from the HRL. The Department of Planning then abandoned its duty to enforce the zoning law and bowed to the mayor's illegal "administrative decision."

***21** This case is more egregious than *Sierra Club*. The mayor not only abandoned his duty, he took extraordinary and illegal action to prevent the Department of Planning from fulfilling its legal duty and kept the law from being enforced. The burden on Homeowners was great, as the County waged its own ardent opposition and joined in every voluminous motion filed by the developer. The Record on Appeal consists of 40 volumes Homeowners, mostly **elderly**, retired folk, had to retain counsel willing to take on wealthy developers and a government entity with vast resources. As the trial court recognized, Homeowners met the second prong of the *Sierra Club* test.

3. *Third Prong -- Homeowners' Suit Benefitted A Large Number Of Persons.*

a. Sierra Club *Affirmed An Expansive View Of The Third Prong.*

Homeowners' lawsuit will benefit, for a long time, the entire population of Maui. The judgment in their favor clarifies and promotes the rule of law. It clarifies that County officials and agencies, including the mayor, are servants of the public obliged to follow the law. The boundaries between the mayor and the Department of Planning established in the County Charter have been reaffirmed. The mayor cannot unilaterally change or make the law by proclamation, but is bound by the deliberative public processes of the County's rule-making bodies. Moreover, the lawsuit made clear that the Maui Height Restriction is 30 feet

from natural or finished grade, whichever is **lower. This ruling benefits every person involved in real estate development on Maui, as well as their prospective purchasers and neighbors.**

The importance of public participation in the zoning process is axiomatic. Unchallenged, Mayor Arakawa's illegal exemption of the developer from the HRL would have vitiated the zoning process, which depends on a meaningful opportunity for public ***22** participation. In this case, the County effectively argued that County officials can enforce or ignore whatever zoning laws they want without public review or public notice. This view, if unchallenged, would have discouraged the residents of Maui from taking the time to attend public hearings on zoning issues and undermine public respect for the law.

The Sierra Club's lawsuit against the DOT met the third prong because a large number of people will benefit for a long time **from the clarification** of a generally applicable environmental law, which included ensuring public review. The Supreme Court held: DOT and Superferry argue that Sierra Club's "theory of benefit is based on the Hawaii Supreme Court decision that was supplanted by Act 2." *Sierra Club* argues, however, that this court's opinion in *Sierra Club* I **provided a public benefit, because it is generally applicable law that** established procedural standing in environmental law and clarified the need to address secondary impacts in environmental review pursuant to H.R.S. Chapter 343 and **will "benefit large numbers of people over long periods of time.**" *Sierra Club* also cites to this court's opinion in *Sierra Club* 7, 115 Hawai'i at 343, 167 P.3d at 336, which stated: " '**All parties involved and society as a whole' would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the *Hawai'i Environmental Policy Act.***" (Emphasis removed.) **We agree with *Sierra Club***[.]

Sierra Club at 221, 202 P.3d at 1266 (emphasis added).

Likewise in the case at bar, the entire island of Maui will benefit, for a long time, from the clarification of the generally applicable ordinance because the County will no longer be able to arbitrarily exempt a favored party from the zoning law. The residents of ***23** Maui will be encouraged to participate in the zoning process because they know the process cannot be ignored. And, the building height restriction has been settled.

Because of Homeowners' lawsuit, all of Maui will benefit because the County Charter has been clearly recognized as prohibiting the mayor from exercising legislative power. Also, the Department of Planning may now function properly, free from unlawful interference by the mayor, in accordance with the County Charter. Due to this lawsuit, all persons on Maui going through and affected by the zoning process are now assured the even application of the law free from arbitrary "administrative decisions." All of Maui is assured that decisions involving development will be conducted through the lawfully established zoning process with the opportunity for meaningful public participation. All of Maui is assured that it will be the Department of Planning with its procedures for hearings and appeals that will be responsible for zoning issues, and not the mayor by fiat.

Like the Sierra Club challenging the DOT's "erroneous exemption" of the Superferry from the environmental assessment process, Homeowners challenged the County's "erroneous exemption" of a developer from the zoning process. As in *Sierra Club*, Homeowners' lawsuit was necessary to stop unlawful government discrimination in favor of one party that would have vitiated the even application of the law intended to benefit the public as a whole. In addition, the mayor's power was properly circumscribed according to the County Charter, the rule of law concretely promoted on the island of Maui, and numerous homeowners received the direct benefit of the limitation of the height of the neighboring development. Also, there is a greatly reduced likelihood of future developers claiming an exemption from the zoning law after holding a closed-door meeting with the mayor. Thus, Homeowners meet the third prong of the *Sierra Club* test.

24 b. *The California Authority Relied Upon In* Sierra Club *Supports Homeowners' Position.

Sierra Club relied upon *Serrano v. Priest*, 569 P.2d 1303 (1977), the seminal California case adopting the private attorney general doctrine. *Sierra Club* at 219, 202 P.3d at 1264 n. 22. *Serrano's* progeny underscores the appropriateness of an award of fees in this case.

In an extremely similar zoning law case to the case at bar, in *Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles*, 23 Cal. 3d 917, 593 P.2d 200 (1979), the appellate court reversed the denial of fees under the doctrine. The case involved a challenge by homeowners against the unlawful approval of a subdivision by the city:

> Plaintiffs, Woodland Hills Residents Association, Inc. and a number of individual members of the association, instituted the underlying mandamus action against three governmental entities of the City of Los Angeles (the city council, the planning commission, and the advisory agency), **challenging the entities' approval of a subdivision map** for a proposed subdivision to be located in the Woodland Hills site in Los Angeles. The proposed development covered a hillside area of 38 acres and contemplated the removal of approximately 90 feet from the top of a ridge and **the filling of adjacent valleys with 750,000 cubic yards of earth to create a mesa which would hold 123 single family homes.** Plaintiffs' complaint alleged that the various agencies' approvals of the subdivision map were deficient in three principal respects: first, the complaint asserted that the approvals were invalid both because the agencies had failed to make specific findings that the subdivision in question was consistent with the applicable general plan and also because the subdivision was in fact inconsistent with the general plan; second, **plaintiffs asserted that the approval was invalid** because the city agencies had failed to prepare an environmental impact report prior to the approval of the subdivision map; and third, ***25** plaintiffs contended that **the city had failed to fulfill a number of additional duties imposed by a variety of municipal ordinances.** * * * Initially, the trial court rejected all of plaintiffs' contentions and entered judgment in favor of defendant city agencies, but on appeal the Court of Appeal reversed, concluding that **the city agencies had erred in approving the subdivision map** without making specific findings that the proposed subdivision was in fact consistent with the city's general plan. Finding that the earlier proceedings before the local agencies failed to provide an adequate indication that the proposed subdivision had in fact been found consistent with the applicable general plan, the Woodland Hills I court directed the trial court to set aside the city's approval of the subdivision map and to **remand the matter to the city council so that it could proceed "in the manner required by law."**

Woodland Hills at 926-27, 593 P.2d at 203-04 (emphasis added) (some citations omitted).

Although remanded to ultimately decide the issue of the homeowners' request for fees because the private attorney general statute had been enacted during the appeal, the court specifically found consideration of the doctrine appropriate under these facts. *Id*. at 942, 593 P.2d at 214. The court explained:

> Plaintiffs alternatively maintain that the Woodland Hills I litigation itself, without regard to stare decisis, provided significant benefits to the general Los Angeles populace by assuring that the particular development at issue in the case was not approved without a specific determination that the subdivision in fact conformed to the applicable general plan. As explained above, however, our decision in Serrano III makes it clear that benefits of this nature - **which derive primarily from the effectuation of statutory policy** -- are in themselves insufficient to sustain an attorney fee award under the substantial benefit theory. This conclusion in no way denigrates the importance or significance of such benefits, but ***26** rather simply recognizes that **the private attorney general doctrine** rather than the substantial benefit theory **is the appropriate basis** for evaluating attorney fee requests arising **from the effectuation of such statutory policies.**

Woodland Hills at 926-27, 593 P.2d at 203-04.

Although it did not decide the matter, the court laid the basis for an expansive view of the application of the private attorney general doctrine, including zoning cases.

Following *Woodland*, fees were awarded under the doctrine in a zoning law case in *Kern River Public Access Com. v. City of Bakersfield*, 170 Cal. App. 3d 1205, 217 Cal. Rptr. 125 (1985). The court awarded fees after **two fishermen** and a nonprofit organization successfully challenged the approval of a subdivision by a city council **that had been initially rejected** by its planning commission. *Id*. at 1213, 217 Cal. Rptr. 129. The court found a significant benefit to a large number of people when the city was compelled to enforce its own zoning law:

The purpose of the private attorney general doctrine codified in *Code of Civil Procedure* section 1021.5 [4] is "to encourage suits effectuating a strong [public] policy." This purpose is advanced by the award in this case. The Legislature has expressed its intent to implement and extend the state constitutional right of access to the rivers of California. ***27 When a local agency, like the city in this case, fails to enforce this law, private suits like this one are the only practical way to effectuate the policy, so attorney's fee awards are appropriate.** An attorney's mistaken expression of opinion, as a private citizen, should not disqualify him from further participation in the process or affect his client's right to an award of attorney's fees. Appellants also contend that the judgment does not confer any "significant benefit" on the public. * * * Appellants' complaints about the negative effect of the judgment are exaggerated. On the positive side, there has been an examination and enforcement of the public's right of access to the Kern River's banks within the subdivision. This will establish a precedent for future development along the Kern River. **Now that it has been appealed, this case will have a significant benefit of clarifying the law statewide. In addition, the city council will be ordered to comply with the law** by making appropriate findings on the safety aspect of the public easement. In *Woodland Hills Residents Assn., Inc. v. City Council, supra*, 23 Cal.3d 917, 939-941, **the Supreme Court recognized that forcing a city council to comply with the Subdivision Map Act** by making proper findings **could be a "significant benefit"** and presented a factual issue to the trial court. Here, the trial court has determined that factual issue in its award of attorney's fees. Appellants have not presented any reason why we should overturn that implicit factual finding.

Kern at 1226-27, 217 Cal. Rptr. at 137-38.

In both *Kern* and the case at bar, there was a significant benefit to the general public by compelling a local government to follow its own zoning laws.

In *Los Angeles Police Protective League v. City of Los Angeles*, 188 Cal. App. 3d 1, 232 Cal. Rptr. 697 (1986), a league representing a small group of 76 police officers affected by a $5.00 a month parking fee imposed by the City Council filed a protest with ***28** the City's employee relations board. The board found for the officers, and ordered the City to stop charging the fee, repay those who had paid, and "meet and confer" with the league before a fee was reimposed. **The City Council ignored the ruling of its own board.** *Id*. at 5, 232 Cal. Rptr. at 699.

The league then filed a successful legal action to enforce the board's ruling, but the trial court denied an award of fees under the private attorney general doctrine. **The appellate court reversed,** and explained cogently why a large number of people benefit when a local government is forced to follow the decision of one of their own administrative boards. The rationale is directly applicable to the case at bar:

Narrowly conceived, all this court decided in its appellate opinion was that the City of Los Angeles cannot impose parking fees on police officers without "meeting and conferring" with the officers' representatives. **And viewed from the trial court's perspective this may have appeared to be the major issue involved.** The trial judge did not appear to fully appreciate what was really at stake in this appeal. **The most important issue was created when the City took the action of refusing to comply with the employee relations board's decision** in favor of the League and by its position during oral argument that it was entitled to refuse to comply without seeking permission from the court because the City and its agency were the same entity. This principle is much broader than disputes over "meet and confer" requirements or disputes between police officer organizations and City governments. **Instead it implicates the enforceability of the decisions made by a wide variety of municipal agencies,** commissions and boards. It was this principle which was announced and this right which was vindicated

in our decision in the first *Los Angeles Police Protective League v. City of Los Angeles* opinion. * * * The class of persons benefitted is not merely 76 police officers or, for that matter, the several hundred or several thousand other ***29** City employees who have been affected by this particular parking fee issue. Rather, it extends to all employees and **all citizens whose claims and rights are decided in the first instance by employment relations boards or similar boards, commissions and agencies. The primary benefit is that when they win decisions before these bodies the decision will be binding on the City** unless the City takes the affirmative step -- and makes the financial investment -- to challenge the body's action in the courts. As a result of the decision reached in this legal action, **the City cannot ignore a decision of a board or commission *on a whim or for political expediency***. The city council will know it must be prepared to prove in court that the board or commission erred. These are benefits which may be difficult to quantify. **But they are wide-spread and "substantial.**"

Los Angeles Police Protective League at 11-14, 232 Cal. Rptr. at 704-05 (emphasis added).

Likewise in the case at bar, there was a significant benefit to the general public by ensuring that the decisions of County agencies such as the Department of Planning have meaning, and cannot be ignored "on a whim or for political expediency" by the mayor or other official.

c. *Additional Cases From Hawaii And Other Jurisdictions Relied Upon In* Sierra Club *Support Homeowners' Position.*

Sierra Club cited a number of other cases applying the doctrine that support Homeowners' position:
This court also recognized in *Waiahole II* that "[a] number of courts have adopted and applied the 'private attorney general' doctrine in awarding [attorney's] fees to public interest litigants." *Waiahole II*, 96 Hawai'i at 30, 25 P.3d at 805 (*citing Serrano*, 569 P.2d 1303; *Arnold*, 775 P.2d 521; *Hellar* ***30** *v. Cenarrusa*, 682 P.2d 524 (Idaho 1984); *Watkins v. Labor & Indus. Review Comm'n*, 345 N.W.2d 482 (Wis. 1984); *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800 (Mont. 1999); *Stewart v. Pub. Serv. Comm'n*, 885 P.2d 759 (Utah 1994); *Town of St. John v. State Bd. of Tax Comm'rs*, 730 N.E.2d 240 (Ind. Tax 2000)).

Sierra Club at 219, 202 P.3d at 1264 n. 22.

These cases support an **expansive view of the "number of persons benefitted"** prong. This expansive view is consistent with the doctrine's policy to facilitate lawsuits that promote the public interest.

In *Waiahole II*, the third prong was satisfied because of an extremely broad reading of who qualified as a beneficiary of a clarification of the law, being "all of the citizens of the state, present and future":
Having reviewed the background of the private attorney general doctrine, and assuming *arguendo* that we were to embrace the doctrine as a general matter, we hold that the doctrine does not apply to the particular circumstances of the present case. **This case appears to meet the first and third prongs of the doctrine's three-prong test.** As this court recognized, this case involved constitutional rights of profound significance, and **all of the citizens of the state, present and future, stood to benefit from the decision.** *See Waihole Ditch I*, 94 Hawai'i at 189, 9 P.3d at 501 (recognizing the "ultimate importance of these matters to the present and future generations of our state"). The public rights at issue in this case compare favorably with those considered in other cases in which the courts awarded attorney's fees under the private attorney general doctrine.

Waiahole II at 31, 25 P.3d at 806 (emphasis added).

***31** *Sierra Club* and *Waiahole II* both hold that the third prong is satisfied by the **benefit to the general public brought by the clarification of a generally applicable law.**

In *Watkins v. Labor & Industry Review Com.*, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), the Wisconsin court emphasized that if attorney's fees are not granted in public policy cases, then lawyers will simply not be able to afford to undertake such vital work. The court held:

> Here, Gloria Watkins, despite being the prevailing party, has not been "made whole." At oral argument, LIRC conceded that point. She incurred substantial attorney's fees which, if unreimbursed, would place her in a significantly worse economic position than when she began her suit. It would be contrary to the purposes of the Act **if the person whose rights have been vindicated ends up in an economically worse position than when he or she started.** In order to make Gloria Watkins "whole," she must be able to recover reasonable attorney's fees.

Watkins, at 764, 345 N.W.2d at 487.

As in *Watkins*, lawsuits that benefit the public interest on Maui will be discouraged without an award of attorneys' fees under the doctrine in the case at bar. That is particularly so because the Plaintiffs here are all either retired **elderly** or working class families.

In *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 Mont. 263, 296 Mont. 402, 989 P.2d 800 (1999), the Montana court took an expansive view of the number of persons benefitted to include "all persons **interested** in Montana's public schools." The decision **overturned** a denial of attorney's fees utilizing the **abuse** of discretion standard. The court held:

***32** We adopt the private attorney general theory and the three part inquiry set forth in *Serrano*. Further, we conclude that Montrust is deserving of attorney fees under the private attorney general theory. First, Montrust has litigated important public policies that are grounded in Montana's Constitution. Second, the State argues that it had a duty to defend the statutes in the present case; thus, the State does not dispute the necessity of private enforcement of Montana's Constitution. Nor does the State dispute the magnitude of Montrust's consequent burden. **Third, Montrust's litigation has clearly benefitted a large class: all Montana citizens interested in Montana's public schools.** The award of attorney fees "to make the injured party whole" is **within the discretion of a district court.** *Russell Realty Co. v. Kenneally* (1980), 185 Mont. 496, 505, 605 P.2d 1107, 1112 (citation omitted). In determining whether the trial court **abused** its discretion, the question is not whether the reviewing court agrees with the trial court, but, rather, did the trial court in the exercise of its discretion act arbitrarily without the employment of conscientious judgment or exceed the bounds of reason, **in view of all the circumstances, ignoring recognized principles resulting in substantial injustice.** *Porter v. Porter* (1970), 155 Mont. 451, 457, 473 P.2d 538, 541. * * * **We hold that the District Court abused its discretion in denying Montrust's request for reasonable attorney fees.**

Montanans for the Responsible Use of the School Trust at 422, 989 P.2d at 817.

As in *Montanans*, "in view of all the circumstances" and given the holding in *Sierra Club*, a denial of attorneys' fees to Homeowners would result in "substantial injustice," and constitutes an **abuse** of discretion. This is so because the trial court disregarded "rules or principles of law or practice," *State v. Lee*, 90 Hawai'i at 134, 976 P.2d at 448, by failing to utilize the broad application announced in the *Sierra Club* case regarding the public benefit in cases such as this where governmental laws are clarified, ***33** thereby benefitting all who are subject to those laws. The trial court's error is also a cause of "substantial detriment of a party litigant," *Lee*, because a courageous group of **elderly** and working class homeowners decided to take the significant risk of challenging the City's failure to enforce its own laws. These parties and their counsel incurred enormous expense with regard to the attorney time involved, as evidenced by the forty volume record on appeal in this case. To deny attorneys' fees under the private attorney general doctrine accordingly constitutes an **abuse** of discretion by the trial court and is therefore appropriately subject to reversal.

VI. *CONCLUSION*

Homeowners respectfully request that the ICA reverse the ruling of the trial court denying their request for attorneys' fees, to enter an order awarding such fees, and to remand to the trial court to determine the amount of such fees.

Footnotes

1 *See* Maui County Code (MCC): MCC § 19.04; MCC § 19.08.050; MCC § 19.04.030 (discussed *infra).* Appendices 16, 17 and 18.

2 Referred to in Plaintiffs' Fourth Amended Complaint at ¶ 48 as the Palama Development, as it is adjacent to Palama Drive. Vol. 19, 303 *f.*

3 Referred to in Plaintiffs' Fourth Amended Complaint at ¶ 43 as the Nakoa Development. *Id.*

4 California has codified the private attorney general doctrine: "Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: **(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons,** (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor." *Code of Civil Procedure* § 1021.5 (emphasis added).